SANITIZED DEC. 04-178 SV – BY R. MICHAEL REED – SUBMITTED FOR DECISION 10/20/04 – ISSUED 02/28/05

SYNOPSIS

SEVERANCE TAX -- TIMBER -- DECLARATION OF STATUS BY PARTIES NOT *PER SE* DETERMINATIVE -- The true substance of the relationship between the parties -- as shown by all of the evidence and in light of the applicable severance tax law -- and not the declaration of status by the parties, by itself, determines who is the "producer" liable for the severance tax.

SEVERANCE TAX -- TIMBER -- STATE DIVISION OF FORESTRY'S INTERPRETATION OF STATE TAX LAW NOT BINDING -- The State Tax Commissioner and this tribunal are not bound by the interpretation of this State's timber-severance tax law furnished by the West Virginia Division of Forestry.

SEVERANCE TAX -- TIMBER -- LIABLE "PRODUCER" UNDER "PERCENTAGE AGREEMENT"-- A person who severs, tops, and de-limbs timber and hauls and sells the resulting logs to a lumber mill operator is liable as the sole "producer," when, as here, that person: (a) has an economic interest in the timber immediately after the same is severed, by virtue of having purchased from the landowner a 50% share of the sales proceeds; (b) looks solely to the timber sales proceeds for income from the production; and (c) sees that the landowner receives a 50% royalty from the lumber mill operator. In these circumstances, the State Tax Commissioner's conclusion that a production by a "joint venture" (involving the logger and the landowner) has not been established is a reasonable conclusion.

SEVERANCE TAX -- CONCEDED CLERICAL ERRORS IN AUDIT WORKPAPERS -- The West Virginia Office of Tax Appeals will modify a severance tax assessment when, as here, the State Tax Commissioner concedes at the evidentiary hearing that the audit work papers contain two clerical errors.

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on January 21, 2004, the Director of this Division of the Commissioner's Office issued a severance tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions

of Chapter 11, Articles 10 and 13A of the West Virginia Code. The assessment was for the calendar and tax years of 2000 through 2002, for tax, interest, through January 31, 2004, and no additions to tax, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked March 03, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

In due course, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003). The evidence was presented at the hearing in a very well organized manner. This matter was submitted on October 20, 2004, for a Final Decision on the evidence and the thorough, yet concise, post-hearing briefs of the parties.

FINDINGS OF FACT

1. During the assessment period, and relevant to the fact patterns at issue in this assessment, the Petitioner engaged in the business of severing timber (trees) standing on lands owned by other persons, that is, removing the standing tree from the stump, and cutting (topping and de-limbing) the felled timber, as well as loading and hauling ("skidding" and transporting) the resulting raw logs to a lumber mill for sale to the owner-operator of the lumber mill. Transcript ("Tr.") at pages 19-21.

2. The Petitioner almost always operates his business on the basis of oral contracts with the landowners. Tr. at 25-26.

3. With much input from the Petitioner, the landowner decides which trees will be severed, etc.; the landowner has the right to control the land on which the trees stand. Tr. at 40-41.

4. The Petitioner, at its expense, provides all of the equipment, fuel, and labor to sever and cut the timber and to load and haul the resulting logs to the lumber mill. Tr. at 41.

5. The Petitioner virtually never purchases standing timber, outright, from a landowner, that is, for a fixed-dollar sales price. Tr. at 39.

6. Instead, the usual (oral) contract calls for the Petitioner and the landowner to share the proceeds of the sale, to the lumber mill operator, on a percentage basis, customarily an equal 50%/50% split. Tr. at 21; Petitioner's Exhibit #5 (the one written contract during the assessment period; that one-page, written contract, drafted by one of the Petitioner's employees who is not a lawyer, refers to the Petitioner as the "Purchaser" and the landowner as the "Seller").

7. The Petitioner normally suggests a particular, nearby lumber mill -- and the landowner almost always goes along with the Petitioner's suggestion in this regard, because of the proximity and excellent reputation of the lumber mill operator. Tr. at 21-22.

8. After the Petitioner hauls the logs to the lumber mill, the operator of the mill issues and separately delivers two checks, one to the Petitioner and one to the landowner, based upon their respective shares of the proceeds (usually 50%/50%), as communicated by the Petitioner to the lumber mill operator. Tr. at 8, 18, 12-14. The Petitioner itself never issues or delivers a check to the landowner for the landowner's share of the proceeds of the sale to the lumber mill operator. Tr. at 18.

9. The lumber mill operator keeps track of the names and federal employer identification numbers and social security numbers of all persons to whom the mill issues checks to purchase the logs (but the mill operator does not issue Internal Revenue Service Forms 1099's for these transactions, because the mill operator is purchasing a product, not a service). Tr. at 14.

10. The Petitioner reported its timbering operations to the West Virginia Division of Forestry, sometimes over the telephone (as allowed), but usually in writing, on the West Virginia Division of Forestry's "Timbering Operation Notification Form," designated as "WVDOF-LSD-F4" (Rev. 12/97). Tr. at 24; Petitioner's Exhibits Nos. 2, 3, 7.

11. On October 30, 1996, the West Virginia Division of Forestry last published its "Instructions" for completing that Division's timbering operation notification form. At page 2, "Section 'D,'" of these Instructions is the following relevant language:

> Payment of severance tax is the responsibility of the person who has title to or an economic interest in the timber at the time it is cut from the stump.
>
> Lump sum sales will, in most cases, require the purchaser of the standing timber to pay severance tax. Percentage sales will, in most cases, have two parties responsible for payment of severance tax. Each party pays severance tax on the percentage of gross sales received.
>
> For further explanation or information contact the West Virginia Department [*sic*; Division] of Tax [at specified telephone numbers].

(emphasis by the Petitioner here) These "Instructions" of the West Virginia Division of Forestry are contained in the record in this matter as "Petitioner's Exhibit # 13."

12. By a letter to the Director of the West Virginia Division of Forestry, dated June 18, 2002, the Chief Administrator for Revenue Operations of the West Virginia State Tax Division responded to a then-recent, written request on behalf of loggers "and others" who were "confused" about which person is responsible for payment of the

severance tax on timber production. This letter contains the following relevant "Example 4":

> John Doe owns land and the trees growing on his land. Mr. Doe has an agreement with ABC Logging to split the proceeds of ABC's logging activity on his land fifty-fifty. ABC Logging cuts, tops, de[-]limbs, skids, transports and sells logs to the Bandsaw Lumber Company.
>
> ABC Logging has undertaken an investment, in the form of a contingent liability [actually, in the form of a purchase of a 50% interest in the proceeds of the sale to Bandsaw], for payment of 50% of timbering proceeds to Mr. Doe. In so doing, ABC Logging has acquired an interest in standing timber, and has secured, by a legal contractual relationship with Mr. Doe, income derived from the severance of the timber, to which ABC Logging must look for a return of his capital. ABC [Logging] holds an interest in the timber immediately after it is severed in the form of a right to 50% of the proceeds.
>
> ABC Logging holds the economic interest in the logs, and ABC is responsible for payment of the Timber Severance Tax on 100% of the taxable receipts attributable to severance activity. Mr. Doe's share of proceeds is equivalent to a royalty payment.

(emphasis by the Respondent here) This letter from the West Virginia State Tax Division is contained in the record in this matter as "State's Exhibit # 4."

13. The Petitioner was audited during the year 2001 by the Internal Revenue Service for the calendar and tax years 1997 and 1998. The IRS determined that the Petitioner limited liability company's owners owed a federal income tax deficiency for the year 1997, based primarily upon disallowing some reported long-term capital gains -- and determining them to be, instead, higher-taxed ordinary business income. While the evidentiary record in the matter now before this tribunal is not clear on the point, the apparent position of the IRS was that -- due to the landowners' "retention" of an "ownership" interest in the felled trees (in the 50%/50% transactions) -- the Petitioner did not obtain a depletable economic interest in capital assets, as a result of its "investing" only its costs of production. On the other hand, the IRS determined a refund was due for the year 1998, for reasons apparently not pertinent to the matter now before this tribunal.

The amount of the 1998 federal income tax overpayment was slightly larger than the amount of the 1997 federal income tax underpayment. Petitioner's Exhibit # 12. The Petitioner did discuss the proposed federal audit changes with the revenue agent's supervisor but did not, however, request a conference with the IRS' Appeals Office. The IRS did not, therefore, explain its position in writing (at least, no such writing was offered into evidence here). As stated by the certified public accountant that represented the Petitioner before the IRS, the Petitioner ultimately chose to accept the federal audit changes for both years, because the net overpayment/underpayment amounts for the two years together essentially "balanced out." Tr. at 63-66.

14. Only four alleged fact patterns are at issue in this matter. Petitioner's Exhibit # 14; Tr. at 72-74.

In the years 2000 and 2002, three alleged fact patterns are involved:

(1) Transactions in which the Petitioner severed and cut the timber under a percentage agreement with the landowner and, under the language of the West Virginia Division of Forestry's Timbering Operation Notification Form, both parties are responsible for paying the severance tax based upon their respective percentages of the gross sales proceeds received from the lumber mill operator;

(2) Transactions for which the landowners have signed statements that they (fully) owned the timber and are responsible for payment of all of the severance tax;

(3) Transactions in which there is: (a) only an oral contract with the landowner; (b) no Division of Forestry notification form was presented at the evidentiary hearing; and (c) the Petitioner alone assets that the landowner is responsible for the payment of all of the severance tax.

In the year 2001 (only), one additional alleged fact pattern, alleged fact pattern no. (4), is involved: transactions in which, according to the Division of Forestry notification form, the Petitioner was merely a "contract logger" and a certain landowner is named as being the person responsible for payment of all of the severance tax.

15. With respect to the only proven type of the alleged fact patterns, that is, fact pattern no. (1), involving a "percentage agreement" with the landowner, this tribunal finds that the following facts were established on the evidentiary record:

(1) The Petitioner does have an economic interest in the timber immediately after it severs the same, specifically, it has, in essence, purchased from the landowner, a 50% interest in the proceeds of the sales to the lumber mill operator; Petitioner's Exhibit # 5 & Tr. at 21;

(2) While the Petitioner was allowed depreciation, not depletion, by the Internal Revenue Service, at least for two years shortly before the assessment period here, the record is inconclusive as to whether the Petitioner has any investment which is, as a matter of federal law (not just as part of a "negotiated agreement," Tr. at 66), recoverable, through depletion, and not through depreciation; Petitioner's Exhibit # 12 & Tr. at 63-66;

(3) The contractual agreements between the Petitioner and the landowners are, apparently, not terminable without cause and on short notice; Petitioner's Exhibit # 5;

(4) While the Internal Revenue Service did not allow the Petitioner to claim depletion for two years shortly before the assessment period here, the record is inconclusive as to whether the Petitioner, as a matter of federal law (not just as part of a "negotiated agreement," Tr. at 66), is entitled to claim any depletion allowance for federal income tax purposes; Petitioner's Exhibit # 12 & Tr. 63-66;

(5) The Petitioner is obligated to pay a royalty to a landowner, that is, the Petitioner is obligated to make sure that the lumber mill operator, on behalf of the Petitioner, remits to the landowner 50% of the proceeds from the sales to the lumber mill operator; Petitioner's Exhibit # 5; Tr. at 21;

(6) The Petitioner apparently has the exclusive right to sever the timber involved in the contracts; Petitioner's Exhibit # 5;

(7) The Petitioner obtains its compensation exclusively from the proceeds from the sales of the logs to the lumber mill operator, Petitioner's Exhibit # 5; and

(8) While the landowner has some input into a few of the decisions involved in the timbering and sale processes, the Petitioner has the right to control and does control the details of virtually all of the activities from the time the logs are severed until the time of the sale; Petitioner's Exhibit # 5 &, e.g., Tr. at 19-21, 40-41.

16. With respect to alleged fact patterns nos. (3) and (4) described above in Finding of Fact No. 14 (see also Petitioner's Exhibit # 14), the Petitioner has failed to establish, by any independent, corroborating evidence, that those alleged fact patterns did occur, rather than the percentage-agreement fact pattern (fact pattern no. (1)). With respect to alleged fact pattern no. (2), see Conclusion of Law No.1, below.

17. At the evidentiary hearing the Respondent conceded that the field audit workpapers contain two clerical errors resulting in an excessive assessment of tax: (1) the "7/13/01" transaction is improperly taxed upon 500% of the gross proceeds (instead of the proper 50% for sales, without further processing, to a sawmill, *see* 110 C.S.R. 13A, § 4.4.2.2 (Apr. 15, 1992)), which results in $ too much gross proceeds, and $ too much tax (3.22% tax rate); and (2) the "5/24/02" transaction, showing $ gross proceeds must be deleted, as it is actually duplicative of the "5/31/02" transaction, showing $ gross

proceeds, resulting in $ too much gross proceeds and $ too much tax (3.22% tax rate upon 50% of gross proceeds, for sale to sawmill). Thus, these two clerical errors total (rounded to the nearest dollar) $ too much tax.

DISCUSSION

"100% Producer" v. "50% Producer"

The first issue -- a mixed question of fact and law -- is whether the Petitioner was a "producer" of timber, subject to the severance tax, and, if so, to what extent (100% v. 50%).

W. Va. Code 11-13A-3b(a) [1993] imposes a severance tax on timber severance and production, "[f]or the privilege of engaging or continuing within this state in the business of severing timber for sale, profit or commercial use[.]" "The privilege of severing and producing timber shall end once the tree is severed and de[-]limbed." W. Va. Code § 11-13A-4(d) [1987].*

W. Va. Code § 11-13A-2(c)(13) [1995, 2004] defines "taxpayer," in pertinent part, as follows:

* The base portion of the measure of the tax is the "gross value" of the timber produced, as shown, ordinarily, by the gross sales proceeds derived by the producer. W. Va. Code § 11-13A-3b(b) [1993]. The term "gross value" is defined to mean "the market value of the natural resource product, in the immediate vicinity where severed, determined after application of post production processing generally applied by the industry to obtain commercially marketable or usable natural resource products." W. Va. Code § 11-13A-2(c)(6) [1995, 2004].

The severance tax legislative regulations authorize the taxpayer to arrive at the gross value of the timber produced, "in the immediate vicinity where severed," by electing to report 50% of the gross proceeds of the sale to, for example, a sawmill operator, when the taxpayer "produces timber, and sells and delivers his timber products, in the same condition as when those products leave the forest[.]" 110 C.S.R. 13A, § 4.4.2.2 (Apr. 15, 1992). The Petitioner made this election in this matter.

> 'Taxpayer' means and includes any individual, . . . joint venture, [or] association, . . . engaged in the business of severing or processing (or both severing and processing) natural resources in this state for sale or use. In instances where contracts (either oral or written) are entered into whereby persons, organizations or businesses are engaged in the business of severing or processing (or both severing and processing) a natural resource but do not obtain title to or do not have an economic interest therein, the party who owns the natural resource immediately after its severance or has an **economic interest** therein is the taxpayer.

(emphasis added) W. Va. Code § 11-13A-2(c)(4) [1995, 2004] defines an "economic interest" as "synonymous" with that term as used in section 611 of the Internal Revenue Code (as of 12/31/1985), entitling the taxpayer to a depletion deduction for federal income tax purposes.

Subsection 2.4.1 of the legislatively reviewed and approved regulations for the severance tax, 110 C.S.R. 13A, § 2.4.1 (Apr. 15, 1992), elaborates upon the concept of an "economic interest":

> An economic interest, for federal income tax purposes, is possessed in every case in which a person has acquired by investment any interest in [the] mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital. A person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relation he possesses a mere economic or pecuniary advantage derived from production. For example, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation fro extraction or cutting does not convey a depletable economic interest.

(emphasis added) Similarly, section 2.13 of the legislative regulations for the severance tax, 110 C.S.R. 13A, § 2.13 (Apr. 15, 1992), in defining the term "producer," provides: "A producer must have a direct interest in the minerals [or timber] in place and look solely to mineral [or timber] sales proceeds for his income from the production." Finally, 110 C.S.R. 13A, § 3.5.1 (Apr. 15, 1992) provides:

Economic interest. -- The concept of critical importance in determining who is the producer is which party has a **true economic interest** in the mineral [or timber]. In order to have an economic interest, the taxpayer must have a direct interest in the minerals [or timber] in place. One must also have a direct interest in the income from the production of the minerals and look solely to mineral sales proceeds for his income. A taxpayer does not have an economic interest simply because a contract entitles him to an economic or monetary advantage in connection with production of the minerals. For example, a person who has no ownership, title in, or leasehold interest in the mineral deposit or standing timber does not possess an economic interest merely because through a contractual relationship he possesses an economic advantage derived from production. The pivotal question involves the ownership of the mineral [or timber] immediately after it is severed. The owner at that point is the producer.

(emphasis added)

Subsection 3.5.2 of the severance tax legislative regulations, 110 C.S.R. 13A, § 3.5.2 (Apr. 15, 1992), sets forth eight (8), non-inclusive factors to consider in determining who is a natural resource "producer" having a true "economic interest":

> 3.5.2. If a dispute should arise as to which party is the producer and which is the contract miner [or contract logger], the [State] Tax [Division] shall consider, in addition to the substance of the agreements, other factors which shall include, but not be limited to[,] the following attributes which may indicate the presence of ownership or economic interest subjecting such person to the severance tax.
>
> 3.5.2.1. An interest in the mineral [or timber] in place.
>
> 3.5.2.2. An investment which is recoverable through depletion[,] not recoverable through depreciation.
>
> 3.5.2.3. Contractual agreements which are not terminable without cause on short notice.

3.5.2.4. Entitlement to claim a depletion allowance for federal income tax purposes.

3.5.2.5. Obligation to pay royalties to another.

3.5.2.6. Exclusive right to sever, mine, cut or extract the natural resource product.

3.5.2.7. Income from the sale of mineral [or timber] proceeds[,] rather than from other sources.

3.5.2.8. Control over the mineral [or timber] from the time of extraction [or severance] to sale.

See Finding of Fact No. 15, above, for analysis of these factors in the context of the evidence in this matter.

GENERAL ANALYSIS PRINCIPLES

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at all times to recognize and to give more than just "lip service" to two general points: (1) rather than utilizing a purely "*de novo*" scope of review, due deference is to be given by all reviewing tribunals to the expertise of the administrative agency, in this case, the State Tax Commissioner, even with respect to an "issue of law," when that issue of law is one within the expertise of the administrative agency, *see Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995); and (2) any applicable legislative regulation does not merely reflect the administrative agency's position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of

statutory construction, *see Feathers v. West Virginia Board of Medicine*, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing] court [including this tribunal] is whether the agency's answer is based on a permissible construction of the statute." Syllabus point 4, in part, *Appalachian Power Co. v. State Tax Department*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, "the Tax Commissioner need not write a rule that serves the statute in the best or most logical manner; he [or she] need only write a rule that flows rationally from the statute." *Id*., 195 W. Va. at 588, 466 S.E.2d at 439 (emphasis added). Thus, "'[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.'" Syllabus point 3, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, "courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary." *Appalachian Power*, 195 W. Va. at 589, 466 S.E.2d at 440 (*quoting Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

Conceded Two Clerical Errors in Audit Workpapers

The second issue is whether the Petitioner has proven the alleged two clerical errors in the audit workpapers, described in Finding of Fact No. 17, above. As stated in that Finding of Fact, the Respondent has conceded those two errors, totaling $ too much tax.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. With respect to alleged fact pattern no. (2), described above in Finding of Fact No. 14, involving written statements (prepared for the evidentiary hearing) in which certain landowners assert that they are fully responsible for the severance tax, these statements are not determinative *per* se. The true substance of the relationship between the parties -- as shown by all of the evidence and in light of the applicable severance tax law -- and not the declaration of status by the parties, by itself, determines who is the "producer" liable for the severance tax. *Cf.* 110 C.S.R. 13A, § 3.4.4 (Apr. 15, 1992) (in the context of servicing oil and natural gas wells, "[t]he contractual form will not necessarily control the status of the parties in regard to severance tax liability. The status of the parties will be determined by the substance of their relationship. Accordingly, although an agreement may be referred to as a lease, where the true substance of the agreement does not convey ownership or the economic interest in the mineral, in place, such agreements will be construed as service contracts.")

2. The State Tax Commissioner and this tribunal are not bound by the interpretation of this State's timber-severance tax law furnished by the West Virginia Division of Forestry. See Finding of Fact No. 11, above. The Division of Forestry has very limited expertise with respect to state tax laws, even with respect to timbering operations, as acknowledged by that Division's referral in its "Instructions" to the State Tax Division for more information about severance tax obligations.

3. The analysis contained in Example No. 4 of the opinion letter of the Respondent's Chief Administrator for Revenue Operations, described in Finding of Fact No. 12, above, is a reasonable conclusion.

4. A person who, as the Petitioner here, severs, tops, and de-limbs timber and hauls and sells the resulting logs to a lumber mill operator is liable as the sole "producer," when, as here, that person: (a) has an economic interest in the timber immediately after the same is severed, by virtue of having purchased from the landowner a 50% share of the sales proceeds; (b) looks solely to the timber sales proceeds for income from the production; and (c) sees that the landowner receives a 50% royalty from the lumber mill operator. In these circumstances, the State Tax Commissioner's conclusion that a production by a "joint venture" (involving the Petitioner-logger and the landowner) has not been established is a reasonable conclusion.

5. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

6. In light of the foregoing "Discussion," "General Analysis Principles," and "Conclusions of Law" nos. 2-4, the Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether the respective landowners were 50%/50% co-producers along with the Petitioner. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

7. On the other hand, based upon Finding of Fact No. 17 and the related "Discussion" (of the "Second Issue"), the Petitioner has carried the burden of proof

with respect to the issue of whether the audit workpapers contain two clerical errors resulting in $ too much tax. Thus, the correct total for the tax portion of the assessment is $.

DIRECTIVES RESPECTING COMPUTATION OF THE AMOUNT OF INTEREST DUE

1. In accordance with 121 C.S.R. 1, § 73.1.1, the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter.

2. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of interest due and owing consistent with the opinions set forth above.

3. The parties shall make every attempt to reach an agreement with respect to the amount of interest due and owing on the tax found due in accordance with the above-stated opinion of the West Virginia Office of Tax Appeals.

4. If the parties are able to reach an agreement with the respect to the amount of interest due and owing, then within 45 days of service of this decision, and in accordance with 121 C.S.R. 1, § 73.1.2, the parties shall file an agreed upon computation of interest due.

5. Within 15 days of service of this opinion, the parties are to confer for the purpose of making a preliminary attempt to identify the amounts or computations upon which the parties agree and those upon which they disagree.

6. Within 30 days of service of this opinion, the parties shall meet in an attempt to reach an agreement with respect to the computation of interest due in accordance with the above-stated opinion.